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CHRISTIAN et al. v. BULBECK.

Nov. 16, 1916.

[90 S. E. 661.]

1. Boundaries (§ 28*)—Jurisdiction—Title—Statute.—Acts 1912, c. 74, authorizing one having an interest in realty to petition the proper court for the ascertainment and designation of the true boundary lines as to one or more of the coterminous owners on making all persons interested parties, and authorizing the court to direct a survey, and making its judgment, unless reversed, binding on the parties, gave the court jurisdiction to pass upon the title to land included in the boundary line or lines fixed by its judgment in a proceeding thereunder.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 138; Dec. Dig. § 28.* 16 Va.-W. Va. Enc. Dig. 226. See also for analysis and discussion, 1 Va. Law Reg. N. S., 713.]

2. Boundaries (§ 27*)—Action to Establish—Defenses—Adverse Possession.—Under Acts 1912, c. 74, authorizing the ascertainment and designation of the boundary lines of coterminous realty, and providing that the trial shall be conducted as other trials at law, and that the same rules of evidence shall apply, and that the same defenses may be made as in other cases at law, adverse possession, whether with or without color of title, is a proper defense under a plea of the statute of limitations.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 143; Dec. Dig. § 27.* 16 Va.-W. Va. Enc. Dig. 226.]

3. Boundaries (§ 27*)—Action to Establish—Interest of Petitioner—Statute.—Under said chapter, petitioner, having a fee-simple interest in land coterminous with the defendants' land and seeking the establishment of the true location of the boundary lines, in effect involving a controversy as to the ownership of land included in such boundary lines, had an interest in real estate sufficient to enable her to institute the action.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 143; Dec. Dig. § 27.* 16 Va.-W. Va. Enc. Dig. 226.]

4. Adverse Possession (§ 73*)—Color of Title—Deed.—Where defendants in an action to establish boundary lines between coterminous realty claimed under a deed to the points established by a survey thereunder, they had color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 435-442; Dec. Dig. § 73.* 1 Va.-W. Va. Enc. Dig. 208.]

5. Boundaries (§ 37 (3)*)—Action to Establish—Sufficiency of Evidence.—In an action under Acts 1912, c. 74, to ascertain and designate

*For other cases see same topic and KEY-NUMBER in all Key-Number Digest and Indexes.

the boundary lines of coterminous realty, verdict for plaintiff held contrary to the evidence.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 186-191; Dec. Dig. § 37 (3).* 16 Va.-W. Va. Enc. Dig. 226.]

6. Boundaries (§ 3 (3)*)—Monument—Effect.—Where the monument called for by a deed is established by uncontradicted evidence, it becomes binding upon the parties.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 6-19; Dec. Dig. § 3 (3).* 2 Va.-W. Va. Enc. Dig. 582.]

7. Boundaries (§ 36 (3)*)—Action to Establish—Evidence—Plat.—In an action under Acts 1912, c. 74, to ascertain and designate the boundaries, a plat, not referred to or made a part of any part of the plaintiff's or defendant's chain of title, was inadmissible as evidence of the extent or location of the metes and bounds covered by the true title, or by the defendants' color of title.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 166, 167; Dec. Dig. § 36 (3).* 16 Va.-W. Va. Enc. Dig. 266.]

8. Adverse Possession (§ 43 (3)*)—Tacking Possession.—Persons claiming by adverse possession may tack their possession to the possession of those under whom they claim and derive title.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 215-217; Dec. Dig. § 43 (3).* 1 Va.-W. Va. Enc. Dig. 205.]

9. Adverse Possession (§ 116 (4)*)—Tacking Possession—Instruction.—In view of the testimony for the defendants in an action to ascertain and designate the boundary lines of coterminous realty that such possession as they proved was by themselves, the omission in an instruction of a reference to tacking possession of those under whom they claimed was not error.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 66; Dec. Dig. § 116 (4).* 1 Va.-W. Va. Enc. Dig. 205.]

10. Adverse Possession (§ 11*)—Requisites—Intent.—Intention to hold adversely is an essential element of adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 67-76; Dec. Dig. § 11.* 1 Va.-W. Va. Enc. Dig. 205.]

11. Adverse Possession (§ 85 (1)*)—Mistake—Boundaries.—Where possession is originally taken under a mistake and with the conditional intention only to claim title to the true line, and where there is no specific intention as to the extent of the claim of title or of a later or changed and specific intention, it will be assumed that there was no change in the intent.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 498, 656 657, 660, 668; Dec. Dig. § 85 (1).* 1 Va.-W. Va. Enc. Dig. 205.]

12. Adverse Possession (§ 85 (1)*)—Hostile Character—Intent.—As

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between parties and privies, a possession originally taken in subservience to another's title cannot be changed into an adverse possession without proof, not only of a subsequent specific intention to claim adversely, but such proof must go to the extent of bringing notice of such intention to claim adversely to the owner of the dominant estate, or be of such a character that such notice will be presumed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 498, 656, 657, 660, 668; Dec. Dig. § 85 (1).* 1 Va.-W. Va. Enc. Dig. 205.]

13. Adverse Possession (§ 85 (3)*)—Extent—Intention.—Where the proof is that the location of a line in dispute was caused in the first instance by a mistake as to the true boundary, the other facts and circumstances in the case must negative by a preponderance of evidence the inference which will otherwise arise that there was no definite and fixed intention on the part of the possessor to occupy, use, and claim as his own the lands up to a particular and definite line on the ground.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 503, 688-690; Dec. Dig. § 85 (3).* 1 Va.-W. Va. Enc. Dig. 205.]

14. Boundaries (§ 3 (9)*)—Conflicting Elements—Quantity and Other Elements.—In ascertaining boundaries, the quantity of land may be considered as a circumstance bearing upon the establishment of such lines, but one of less weight than natural monuments or corners or reputed boundaries called for in the plat filed with plaintiff's petition.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 41; Dec. Dig. § 3 (9).* 2 Va.-W. Va. Enc. Dig. 600.]

15. Adverse Possession (§ 116 (5)*)—Action to Establish Boundaries—Instruction.—An instruction that if the boundary lines between the parties had been properly determined and laid off by the surveyor appointed by the court in accordance with the plots and metes and bounds attached to or referred to in deeds and muniments of title, and if those lines by mistake of the parties or their predecessors in title became confused so that defendant took possession of part of the land shown by the survey as properly belonging to plaintiff, then, unless defendants had intentionally dispossessed the plaintiff for the purpose of acquiring title by adverse possession to all or a part of the land, the jury should find for the plaintiff in accordance with the report and the survey, was erroneous, as adopting a wrong view of the effect of a mistake in the original location of the boundary lines.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116 (5).* 1 Va.-W. Va. Enc. Dig. 210.]

*For other cases see same topic and KEY-NUMBER in all Key-Number Digest and Indexes.

16. Trial (§ 260 (5)*)—Requested Instructions—Given Instruction.
—In such action, the defendants' requested instructions were properly refused, where the other instructions given for them fairly submitted their theory of the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 655; Dec. Dig. § 260 (5).* 7 Va.-W. Va. Enc. Dig. 742.]

Error to Circuit Court, Amherst County.

Proceedings at law by Marion Bulbeck against C. B. Christian and Sallie B. Christian. Judgment for plaintiff overruling a demurrer to the petition, and defendants bring error. Reversed, and new trial granted.

Caskie & Caskie, of Lynchburg, for plaintiffs in error.

Scott & Meeks and *O. L. Evans*, all of Amherst, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.